

Before the
Administrative Hearing Commission
State of Missouri



MARILYN JEAN HENRY,)	
)	
Petitioner,)	
)	
vs.)	No. 14-0424 AF
)	
MARTY MARTIN-FORMAN,)	
Chief Operating Officer,)	
Fulton State Hospital,)	
)	
Respondent.)	

DECISION

We grant Marty Martin-Forman's motion to dismiss Marilyn Jean Henry's application for attorney fees because we lack jurisdiction to hear it.

Procedure

Henry filed her application for attorney fees and expenses with this Commission on April 4, 2014, and an amended application for attorney fees and expenses on April 11, 2014. Martin-Forman filed a motion to dismiss the amended application on May 7, 2014. Henry filed a response to the motion to dismiss on May 22, 2014.¹

¹ Henry captioned the response showing the case number as 12-2115 PER, so it was temporarily misfiled. It has been moved to the proper case file.

Findings of Fact

1. On June 12, 2008, Henry filed an appeal with the Personnel Advisory Board (“the PAB”) of her dismissal by Martin-Forman from her position as a Registered Nurse III.
2. On January 13, 2009, the PAB issued its findings of fact, conclusions of law, decision, and order in favor of Martin-Forman.
3. On March 8, 2010, the Circuit Court of Cole County entered a judgment reversing the PAB’s decision and remanded the case to the PAB.
4. On May 20, 2010, Martin-Forman appealed the circuit court’s judgment to the Court of Appeals for the Western District.
5. On August 9, 2011, the court of appeals released its opinion in which it affirmed the circuit court’s judgment.²
6. On December 6, 2011, the Supreme Court of Missouri denied the Missouri Department of Mental Health’s application for transfer to that court.
7. On December 3, 2012, Henry filed a petition for rehearing with this Commission, stating that she had prevailed in both courts. She asked us to hold a hearing “and/or proceed otherwise in a manner not inconsistent” with the circuit court order. We assigned case number 12-2115 PER to that case.
8. We held a hearing on March 4, 2014 in 12-2115 PER. At the hearing, it was determined that the circuit court judgment and the court of appeals opinion had resolved the issue of Henry’s dismissal, finding no cause for it. Accordingly, all issues pending at that time had been resolved, except the issue of back pay. Therefore, on March 6, 2014, we closed case number 12-2115 PER.

² *Henry v. Missouri Dep’t of Mental Health*, 351 S.W.3d 707 (Mo. App., W.D. 2011).

9. On March 4, 2014, we opened case number 14-0295 PBP for the purpose of determining the back pay issue. That case is pending.

Conclusions of Law

Because this Commission was created by state statutes, we have only such authority as the statutes give us.³ If we have no jurisdiction to hear Henry's application, we cannot reach the merits of the case and can only exercise our inherent power to dismiss.⁴ Martin-Forman asks us to dismiss Henry's application on the ground that we lack jurisdiction pursuant to § 536.087.4,⁵ which provides in relevant part:

A prevailing party in an agency proceeding shall submit an application for fees and expenses to the administrative body before which the party prevailed. A prevailing party in a civil action on appeal from an agency proceeding shall submit an application for fees and expenses to the court.

Applying this statute, Martin-Forman argues that Henry's application is not properly before us because Henry prevailed, not before this Commission (or its predecessor, the PAB), but at the circuit court.

*The Schulze and Lewis cases—a § 36.390 case resulting
in reinstatement is not final until the amount of back pay is determined*

In response to Martin-Forman's motion, Henry cites § 536.087.3, which provides in relevant part:

A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in an agency proceeding or final judgment in a civil action, submit to the court, agency or commission which rendered the final disposition or judgment an application which shows that the party is a prevailing party and is eligible to receive an award under this section....

³*State Bd. of Regis'n for the Healing Arts v. Masters*, 512 S.W.2d 150, 161 (Mo. App., K.C.D. 1974).

⁴*Oberreiter v. Fullbright Trucking*, 24 S.W.3d 727, 729 (Mo. App., E.D. 2000).

⁵ RSMo 2000.

Henry's argument is that the circuit court's judgment was not a final disposition or judgment because it included a remand to the PAB to determine back pay.

Henry cites *Schulze v. Erickson*⁶ in support of her argument. In *Schulze*, as in this case, a state employee appealed her dismissal from employment pursuant to § 36.390. Unlike this case, however, the employee (Erickson) prevailed at the PAB (whose decision included a conclusion that he was entitled to back pay, but did not establish how much), only to have that decision reversed by the circuit court. When Erickson appealed the circuit court's judgment to the court of appeals, the court of appeals dismissed the appeal *sua sponte* on the ground that the PAB's decision was not final and appealable because the PAB had not determined the amount Erickson earned or could have earned during the period he was deprived of employment, and whether he received any unemployment benefits—in other words, the amount of back pay to which Erickson was entitled. Therefore, the court of appeals held, not only did it not have jurisdiction of Erickson's appeal, the circuit court also lacked jurisdiction to enter its judgment.⁷

Schulze was subsequently cited and applied by the court of appeals in *Lewis v. Bellefontaine Habilitation Ctr.*⁸ In that case, again as in this one, Lewis appealed her dismissal from state employment under § 36.390.⁹ As in *Schulze*, Lewis prevailed at the PAB, who again did not establish a specific dollar amount of back pay. Lewis filed an application for attorney fees and costs with the PAB more than 30 days after the PAB's decision. The PAB granted Bellefontaine's motion to dismiss. Lewis sought review of the PAB's dismissal by a petition for mandamus to the circuit court, which ordered the PAB to consider Lewis' application for attorney fees and costs. The court of appeals affirmed the circuit court's order, holding, as it did

⁶ 17 S.W.3d 588 (Mo. App., W.D. 2000).

⁷ *Id.* at 592.

⁸ 122 S.W.3d 105 (Mo. App., W.D. 2003).

⁹ RSMo 2000. Subsequent amendments are noted below.

in *Schulze*, that the failure of the PAB to decide the amount of back pay meant that its decision was not a “final disposition” of the case that would trigger the 30-day deadline to apply for attorney’s fees and costs.¹⁰

2005 and 2010 amendments to § 36.390

The problem with Henry’s argument is that the underlying holding of *Schulze* and *Lewis*, that a case arising under § 36.390 is not finally disposed of until the amount of back pay is determined, was undoubtedly affected by statutory amendments to § 36.390, and we must determine the extent of that effect. The first amendment occurred in 2005, when the General Assembly amended § 36.390.5 and added new §§ 36.390.6 and 36.390.7, as follows (new language shown in bold type and deleted language struck through):

5. Any regular employee who is dismissed or involuntarily demoted for cause or suspended for more than five working days may appeal in writing to the board within thirty days after the effective date thereof, setting forth in substance the employee's reasons for claiming that the dismissal, suspension or demotion was for political, religious, or racial reasons, or not for the good of the service. Upon such appeal, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard and to present evidence at a hearing which, at the request of the appealing employee, shall be public. At the hearing of such appeals, technical rules of evidence shall not apply. After the hearing and consideration of the evidence for and against a suspension, or demotion, **or dismissal**, the board shall approve or disapprove such action and ~~in the event of a disapproval the board shall order the reinstatement of the employee to the employee's former position and the payment to the employee of such salary as the employee has lost by reason of such suspension or demotion.~~ After the hearing and consideration of the evidence for and against a dismissal, the board shall approve or disapprove such action and may make any one of the following appropriate orders:

(1) Order the reinstatement of the employee to the employee's former position ~~and the payment to the employee of part or all of such salary as has been lost by reason of such dismissal;~~

¹⁰ *Lewis*, 122 S.W.3d at 111.

(2) Sustain the dismissal of such employee, unless the board finds that the dismissal was based upon political, social, or religious reason, in which case it shall order the reinstatement of the employee to the employee's former position and the payment to the employee of such salary as has been lost by reason of such dismissal;

(3) Except as provided in subdivisions (1) and (2) of this subsection, the board may sustain the dismissal, but may order the director to recognize reemployment rights for the dismissed employee pursuant to section 36.240, in an appropriate class or classes, or may take steps to effect the transfer of such employee to an appropriate position in the same or another division of service.

6. Any order by the board under subsection 5 of this section shall be a final decision on the merits and may be appealed as provide¹¹ in chapter 536, RSMo.

7. After an order of reinstatement has been issued and all parties have let the time for appeal lapse or have filed an appeal and that appeal process has become final and the order of reinstatement has been affirmed, the board shall commence a separate action to determine the date of reinstatement and the amount of back pay owed to the employee. This action may be done by hearing, or by affidavit, depositions, or stipulations, or by agreement on the amount of back pay owed. If the parties cannot reach an agreement as to how the parties shall be heard on this separate action, then the board shall decide on the method through its hearing officer. No hearing will be public unless requested to be public by the employee.¹²

In this case, Henry first brought her action in the PAB, lost, appealed to the circuit court, and obtained the circuit court's reversal of the PAB's decision in the period between June 12, 2008 and March 8, 2010. All of those actions, therefore, were governed by § 36.390 RSMo as amended in 2005. Under § 36.390.6 (as added in 2005), the PAB's decision was a "final decision on the merits" subject to appeal. Under § 36.290.7 (as added in 2005), the PAB would

¹¹ As in original. See 2005 Missouri Laws p. 1025.

¹² 2005 S.B. 149, effective August 28, 2005. Subsections 6 through 9 were renumbered 8 through 11 respectively.

have commenced a separate action to determine the date of reinstatement and the amount of back pay owed to Henry, once the appeal process had become final.

However, the appeal process did not become final until December 2011, when the Supreme Court denied the Missouri Department of Mental Health's application to transfer the case after the court of appeals had affirmed the circuit court's judgment. In 2010, the General Assembly again amended § 36.390 and also added a new § 621.075, as part of its transfer of jurisdiction over state employee discipline cases arising under Chapter 36 from the PAB to this Commission. Those amendments, contained in 2010 H.B. 1868, became effective on August 28, 2010. Section 36.390.5 was amended as follows:

Any regular employee who is dismissed or involuntarily demoted for cause or suspended for more than five working days may appeal in writing to the ~~board~~ **administrative hearing commission** within thirty days after the effective date thereof, setting forth in substance the employee's reasons for claiming that the dismissal, suspension or demotion was for political, religious, or racial reasons, or not for the good of the service. ~~Upon such appeal, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard and to present evidence at a hearing which, at the request of the appealing employee, shall be public. At the hearing of such appeals, technical rules of evidence shall not apply. After the hearing and consideration of the evidence for and against a suspension, demotion, or dismissal, the board shall approve or disapprove such action and may make any one of the following appropriate orders:~~

~~(1) Order the reinstatement of the employee to the employee's former position;~~

~~(2) Sustain the dismissal of such employee;~~

~~(3) Except as provided in subdivisions (1) and (2) of this subsection, the board may sustain the dismissal, but may order the director to recognize reemployment rights for the dismissed employee pursuant to section 36.240, in an appropriate class or classes, or may take steps to effect the transfer of such employee to an appropriate position in the same or another division of service.~~

Some of the language struck from subsection 5 was moved to § 621.075.2. Also, the amendment struck § 36.390.6 and moved § 36.390.7 to § 621.075.3, substituting “administrative hearing commission” for “board” in the new statute.

The question, therefore, is: How do the 2005 and 2010 versions of § 36.390 affect when the “final disposition or judgment” occurred in this case? Section 36.390.5 (2005 version) governed Henry’s initial appeal to the PAB. Section 36.390.6 (2005 version) made the PAB’s January 13, 2009 decision in Martin-Forman’s favor a final decision that could be appealed. Henry did appeal the decision, and obtained a judgment reversing the PAB’s decision, on March 8, 2010, while the 2005 version of § 36.390 was in effect.

However, the court of appeals affirmed the circuit court’s judgment in August 2011, and the Supreme Court denied transfer of the case in December 2011. By then, 2010 H.B. 1868 had become law. The 2005 version of § 36.390.6 had been deleted, but that did not matter because the case had passed the “final decision” stage by then and had been appealed. The issue of whether § 36.390.7 (RSMo Supp. 2005) or § 621.075.3 (RSMo Supp. 2010) applied had become moot because by the time the appeal process had become final, this Commission had acquired jurisdiction over the issues of the date of reinstatement and back pay through § 621.075.3, RSMo 2010 Supp.¹³

Thus, the two provisions in § 36.390 that provide the most guidance in this case are § 36.390.6, RSMo Supp. 2005, which makes the PAB’s order a “final decision on the merits” (subject to appeal), and § 36.390.7, RSMo Supp. 2005 and § 621.075.3, RSMo Supp. 2010, both of which provide that an action for back pay is a separate action. Read together, these provisions effectively abrogate the holdings of *Schulze* and *Lewis* that no PAB decision reinstating an employee is final until the amount of back pay is determined.

¹³ As we state above in our findings of fact, the back pay issue is the subject of our case number 14-0295 PB. It is not an issue in this case.

When and where must the application for fees and expenses be filed?

We must still determine when and where fee and expense applications under § 536.087 must be filed. In *Missouri Comm’n on Human Rights v. Red Dragon Restaurant, Inc.*, the court of appeals held that such an application, filed in the court of appeals more than five months after a circuit court had entered judgment in a party’s favor, was subject to dismissal, both for filing in the wrong court and for being untimely filed.¹⁴ And in *State ex rel. Div. of Transp. v. Sure-Way Transp., Inc.*, the court of appeals applied § 536.087.4 and held that an application for fees and expenses had to be filed in the tribunal in which the party *first* prevailed.¹⁵

In this case, Henry first prevailed at the circuit court on March 8, 2010. Accordingly, her application for fees and expenses had to be filed in the circuit court no later than April 7, 2010. Her application, filed on April 4, 2014, was filed more than 30 days after the circuit court’s final disposition—and, under *Sure-Way Transp.*, it was filed in the wrong tribunal.

Even if we were to ignore *Sure-Way Transp.*’s holding that the application had to be filed in the tribunal where the party first prevailed, thus considering the court of appeals to be the court where she prevailed (and considering December 6, 2011 to be the date when the court of appeals proceeding finally ended), Henry’s application was still late. While former § 36.390.6, declaring the PAB’s order in Martin-Forman’s favor a “final decision on the merits,” was struck from the statute in 2010, that subsection only declared such an order to be final subject to appeal. Section 621.075 did not change the 30-day time limit for filing a petition for fees and expenses; that was, at all times, found in § 536.087.3.

Summary

Henry brought her application for attorney’s fees and costs more than 30 days after the final disposition of her case, and brought the application in the wrong tribunal as well.

¹⁴ 991 S.W.2d 161, 172-72 (Mo. App., W.D. 1999).

¹⁵ 948 S.W.2d 651, 658 (Mo. App., W.D. 1997).

Accordingly, we lack jurisdiction to consider her application, and grant Martin-Forman's motion to dismiss.

SO ORDERED on June 11, 2014.

/s/ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner